IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 3, 2003 Session

EVELEAN MORGAN v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission
No. 99000125 W. R. Baker, Commissioner

No. M2002-02496-COA-R3-CV - Filed January 27, 2004

This appeal involves a fatal accident at the Colditz Cove State Natural Area in Fentress County. The mother of a woman who fell to her death from the bluff surrounding Northrup Falls filed a claim with the Tennessee Claims Commission. The State of Tennessee denied liability based on (1) the recreational use defense in Tenn. Code Ann. § 70-7-102 (1995), (2) its lack of actual or constructive notice of a dangerous condition, and (3) its assertion that the decedent's fault exceeded its own. The commissioner granted the State's motion for summary judgment. While he did not rely on the statutory recreational use defense, the commissioner determined that the State had no notice of a dangerous condition at the natural area, it was not reasonably foreseeable that intoxicated persons who were unfamiliar with the natural area would hike into the area of the falls in the middle of the night, and the decedent's actions were the sole proximate cause of her death. The decedent's mother has appealed. We have determined that the commissioner properly granted the summary judgment because, as a matter of law, (1) the State established a defense under Tenn. Code Ann. § 70-7-102, (2) the decedent's estate presented no evidence that the State had actual or constructive notice of an allegedly dangerous condition on the trail in the natural area, and (3) the decedent's fault far exceeded whatever fault could be attributed to the State.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commission Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

David H. Dunaway, LaFollette, Tennessee, for the appellant, Evelean Morgan.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Christopher Michael Fancher, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

I.

Rochelle Copeland Zegilla and her two small children were living with her mother in mid-1997 following a separation from her husband. On Saturday evening, July 26, 1997, she told her mother that she was "going to go out for awhile," and then she drove to the Top of the Mountain Lounge in Jamestown, Tennessee. After the lounge closed at midnight, Ms. Zegilla and four

companions[1] decided to drive to a nearby VFW club. When they arrived at the club, however, they discovered that it had closed earlier than usual. After a brief discussion in the club parking lot, the group decided to continue their drinking and talking in the parking lot of the Colditz Cove State Natural Area.

The Colditz Cove State Natural Area is a 165-acre Class II natural-scientific area in Fentress County owned by the State of Tennessee. It is heavily wooded and contains the 75-foot Northrup Falls and a scenic gorge with interesting rock formations.[2] The area has been designated by statute as "worthy of perpetual preservation,"[3] and accordingly, improvements to the area are limited to foot trails, foot bridges, and primitive campgrounds[4] and "facilities as may be reasonably necessary . . .for the safe and proper management and protection of the area."[5] In addition to a parking lot, the State had erected several signs and a gate and had constructed a 1.5 mile foot trail along the bluff overlooking Northrup Falls, as well as a scenic overlook. The State had not installed lights in the parking lot or along the foot trail.

All of the group except Mr. Raines had been drinking throughout the evening, and they continued drinking in the parking lot because Messrs. Smith and King had brought along a cooler of beer purchased earlier in the evening at Midway Qwick Stop. After talking for several minutes, the group decided to walk down the foot trail toward Northrup Falls in the pitch dark even though three of them, including Ms. Zegilla, had never been to Colditz Cove before. The only illumination they had was Mr. King's flashlight.

When the group reached a fork in the trail, Mr. Raines and Ms. Johnson decided to walk no further and sat near a trash container to talk and drink. Ms. Zegilla and Messrs. Smith and King kept walking along the trail toward Northrup Falls. After they stopped to drink and talk, Mr. King asked Mr. Smith to shine the flashlight into the bushes to enable him to find a place to urinate. Mr. King walked into the bushes and, on his return, he fell over the bluff into the gorge below.

Mr. Smith yelled, "Larry has fallen off," and called to Mr. Raines for assistance. Mr. Raines made his way down the trail to Mr. Smith and Ms. Zegilla. After they all called out to Mr. King to no avail, Mr. Raines decided to go for help and took the flashlight to help make his way back up the foot path to the parking lot. Ms. Zegilla and Mr. Smith, now joined by Ms. Johnson, continued to call for Mr. King. Mr. Smith decided to start a fire with his shirt to make some light. After his shirt went out, Ms. Zegilla somehow fell over the bluff. The rescue workers who arrived at the scene at approximately 1:30 a.m. on Sunday, July 27, 1997, found the lifeless bodies of both Mr. King and

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[1]Ms. Zegilla's companions at the Top of the Mountain Lounge were Chris Smith, Loretta Johnson, Edward Raines, and Larry King.

[2]Tenn. Code Ann. § 11-14-108(b)(2)(F) (Supp. 2003).

[3]Tenn. Code Ann. § 11-14-105(2) (1999).

[4]Tenn. Code Ann. § 11-14-106(a)(1)(B) (1999).

[5]Tenn. Code Ann. § 11-14-106(a)(2).

Ms. Zegilla in the water at the bottom of the falls. An autopsy revealed that Ms. Zegilla's blood alcohol level was .18%.

On July 23, 1998, Evelean Morgan, Ms. Zegilla's mother and her personal representative, filed a claim for $500,000 with the Tennessee Claims Commission asserting that the State had violated Tenn. Code Ann. § 9-8-307(a)(1)(C) (Supp. 2003) by negligently creating or maintaining a dangerous condition at Colditz Cove State Natural Area.[6] The State moved to dismiss the claim on the ground that it was shielded from liability by the recreational use statute [Tenn. Code Ann. §§ 70-7-101, -105 (1995)]. After the claims commissioner denied its motion, the State filed an answer denying Ms. Morgan's negligence claims. The State asserted, as affirmative defenses, (1) that Tenn. Code Ann. § 70-7-102 shielded it from liability, (2) that it had no actual or constructive notice of a dangerous condition at Colditz Cove State Natural Area and that it was not reasonably foreseeable that intoxicated persons who were unfamiliar with the natural area would hike into the area of the falls in the middle of the night, and (3) that Ms. Zegilla's own negligence "contributed in excess of 50% to the cause of her death."

In February 2002, following lengthy and somewhat contentious discovery, the State moved for a summary judgment on two grounds – Tenn. Code Ann. § 70-7-102 and its assertion that Ms. Zegilla's "negligence was equal to or greater than [the] negligence of the State, if any."[7] In April 2002, Ms. Morgan responded by asserting that the State was not entitled to a judgment on either ground because the State was grossly negligent and because its negligence was greater than Ms. Zegilla's. The claims commissioner held a hearing on the State's motion for summary judgment after conducting his own personal inspection of the Colditz Cove State Natural Area without the lawyers or parties present. On June 5, 2002, the commissioner filed an order granting the State's motion for summary judgment. While the commissioner declined to base his decision on Tenn. Code Ann. § 70-7-102, he determined that the undisputed evidence demonstrated as a matter of law that Ms. Morgan had not shown that she could prove notice and foreseeability as required by Tenn. Code Ann. § 9-8-307(a)(1)(C) and that Ms. Zegilla was "preponderantly negligent in her own death."[8] The commissioner later denied Ms. Morgan's request for a hearing before the entire claims commission. Ms. Morgan has appealed.

II.
THE STANDARD OF REVIEW

The standards for reviewing summary judgments on appeal are well-settled. Summary judgments are proper in virtually any civil case that can be resolved on the basis of legal issues alone.

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[6] Ms. Morgan also filed a civil damage action in the Circuit Court for Fentress County against Ms. Johnson, Messrs. Smith and Raines, and the estate of Mr. King.

[7] The State based the latter assertion on what it called the "step in the dark" rule, i.e., that stepping into an unfamiliar dark area constitutes the proximate cause of injuries sustained by falling down stairs hidden in the darkness. *Eaton v. McLain*, 891 S.W.2d 587, 594 (Tenn. 1994); *Goodman v. Memphis Park Comm'n*, 851 S.W.2d 165, 171 (Tenn. Ct. App. 1992).

[8] We construe this finding to be that Ms. Zegilla's fault exceeded the fault of the State, if any. The claims commissioner stated later in its order that "[t]he sole proximate cause of Ms. Zegilla's death was her own actions."

Fruge v. Doe, 952 S.W.2d 408, 410 (Tenn. 1997); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001). They are not, however, appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. Thus, a summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion – that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001).

The party seeking a summary judgment bears the burden of demonstrating that no genuine dispute of material fact exists and that it is entitled to a judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002); *Shadrick v. Coker*, 963 S.W.2d 726, 731 (Tenn. 1998). To be entitled to a judgment as a matter of law, the moving party must either affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Byrd v. Hall*, 847 S.W.2d at 215 n. 5; *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

Once the moving party demonstrates that it has satisfied Tenn. R. Civ. P. 56's requirements, the non-moving party must demonstrate how these requirements have not been satisfied. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). Mere conclusory generalizations will not suffice. *Cawood v. Davis*, 680 S.W.2d 795, 796-97 (Tenn. Ct. App. 1984). The non-moving party must convince the trial court that there are sufficient factual disputes to warrant a trial (1) by pointing to evidence either overlooked or ignored by the moving party that creates a factual dispute, (2) by rehabilitating evidence challenged by the moving party, (3) by producing additional evidence that creates a material factual dispute, or (4) by submitting an affidavit in accordance with Tenn. R. Civ. P. 56.07 requesting additional time for discovery. *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Byrd v. Hall*, 847 S.W.2d at 215 n. 6. A non-moving party who fails to carry its burden faces summary dismissal of the challenged claim because, as our courts have repeatedly observed, the "failure of proof concerning an essential element of the cause of action necessarily renders all other facts immaterial." *Alexander v. Memphis Individual Practice Ass'n*, 870 S.W.2d 278, 280 (Tenn. 1993).

A summary judgment is not appropriate when a case's determinative facts are in dispute. However, for a question of fact to exist, reasonable minds must be able to differ over whether some alleged occurrence or event did or did not happen. *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d 646, 647 (Tenn. 1995); *Harrison v. Southern Ry. Co.*, 31 Tenn. App. 377, 387, 215 S.W.2d 31, 35 (1948). If reasonable minds could justifiably reach different conclusions based on the evidence at hand, then a genuine question of fact exists. *Louis Dreyfus Corp. v. Austin Co.*, 868 S.W.2d 649, 656 (Tenn. Ct. App. 1993). If, on the other hand, the evidence and the inferences to be reasonably drawn from the evidence would permit a reasonable person to reach only one conclusion, then there are no material factual disputes and the question can be disposed of as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d at 695; *Seavers v. Methodist Med. Ctr.*, 9 S.W.3d 86, 91 (Tenn. 1999); *Beaudreau v. General Motors Acceptance Corp.*, 118 S.W.3d 700, 703 (Tenn. Ct. App. 2003).

Summary judgments enjoy no presumption of correctness on appeal. *BellSouth Advertising & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr., Inc.*,

49 S.W.3d 281, 285 (Tenn. 2001). Accordingly, appellate courts must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We must consider the evidence in the light most favorable to the non-moving party, and we must resolve all inferences in the non-moving party's favor. *Godfrey v. Ruiz*, 90 S.W.3d at 695; *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001). When reviewing the evidence, we must determine first whether factual disputes exist. If a factual dispute exists, we must then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

III.
THE APPLICATION OF TENN. CODE ANN. § 70-7-102

The State's defense predicated on Tenn. Code Ann. § 70-7-102 figures prominently in this appeal even though the claims commissioner expressly declined to base his decision on this defense.[9] For her part, Ms. Morgan asserts that the commissioner erred by "failing and refusing" to rule on this defense. While the State does not specifically assert that the commissioner erred by not addressing this defense,[10] it asserts that it did not owe a duty to Ms. Zegilla by virtue of Tenn. Code Ann. § 70-7-102. Accordingly, we have decided to address the applicability of Tenn. Code Ann. § 70-7-102 to this case head on.

A.

At common law, property owners could be held liable for injuries to persons who were using their property, with or without their permission, for recreational purposes. Beginning in the 1950s, state legislatures began to enact statutes to limit property owners' liability when persons were using their property for recreational purposes.[11] The Tennessee General Assembly enacted one of these

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[9]The commissioner's cryptic rulings regarding Tenn. Code Ann. § 70-7-102 are not easy to reconcile. He stated:

> The Commission renders its ruling without considering the applicability of the state Recreational Use Immunity Statute. The individuals involved in this incident were using the State property for recreation, thus the Recreational Use Statute applies.
>
> As for gross negligence, if the facts involved the Recreational Use statute alone, in absence of the other three factors discussed heretofore, then this claim should probably proceed to trial. Although the Commission believes there was not any gross negligence, it does not base its conclusion on the Recreational Use Immunity statute.

Because the commissioner stated twice that he was not basing his decision on Tenn. Code Ann. § 70-7-102, we will take him at his word.

[10]The State could have raised this issue pursuant to Tenn. R. App. P. 13(a).

[11]James C. Becker, *Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective Is the Protection?*, 24 Ind. L. Rev. 1587, 1587-88 (1991).

statutes in 1963.[12] As originally enacted, the statute was applicable only to private landowners and excluded from its coverage the "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity."

In 1987, the Tennessee General Assembly amended the recreational use statute in two significant ways that are directly applicable to this case. First, it amended the statute to explicitly apply to real property owned by governmental entities.[13] Second, it broadened the exemption to cover "gross negligence, willful or wanton conduct."[14]

The operation of the recreational use statutes is straightforward. Tenn. Code Ann. § 70-7-102 is an affirmative defense available to persons who fit within the definition of "landowner" in Tenn. Code Ann. § 70-7-101(2). *Parent v. State*, 991 S.W.2d 240, 242 (Tenn. 1999); *Bishop v. Beckner*, 109 S.W.3d 725, 728 (Tenn. Ct. App. 2002). Landowners may assert a Tenn. Code Ann. § 70-7-102 defense if they prove that the injured person was engaged in a recreational activity[15] at the time of the injury. Plaintiffs may defeat this affirmative defense in essentially three ways: (1) prove that the defendant is not a "landowner," (2) prove that the injured party was not engaged in a recreational activity, or (3) prove that the landowner's conduct fits within one of the three exceptions in Tenn. Code Ann. § 70-7-104. The exceptions in Tenn. Code Ann. § 70-7-104 do not create new independent causes of action against the landowner. Rather, they enable a plaintiff to pursue its negligence claim by negating a landowner's Tenn. Code Ann. § 70-7-102 defense. *Parent v. State*, 991 S.W.2d at 242-43.

Applying Tenn. Code Ann. §§ 70-7-101, -105 to a particular case requires a three-step analysis. First, the court must determine whether the party asserting the Tenn. Code Ann. § 70-7-102 defense is a landowner. Second, the court must determine whether the activity in which the injured party was engaged at the time of the injury is a recreational activity. Third, the court must determine whether any of the exceptions in Tenn. Code Ann. § 70-7-104 are applicable to the case. *See Parent v. State*, 991 S.W.2d at 243. If the activity is recreational and no Tenn. Code Ann. § 70-7-104 exceptions apply, the landowner is shielded from liability by Tenn. Code Ann. § 70-7-102. If, however, the activity is recreational, but one of the exceptions applies, the landowner may be liable.

B.

Based on the undisputed facts, there can be no dispute (1) that the State, as a governmental entity, is a "landowner" under Tenn. Code Ann. § 70-7-101(2)(B), (2) that Ms. Zegilla was engaged in a recreational activity because she was "hiking" or "sightseeing" when she fell to her death, and

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[12] Act of Mar. 15, 1963, ch. 177, 1963 Tenn. Pub. Acts 784, codified at Tenn. Code Ann. §§ 70-7-101, -105 (1995).

[13] Act of May 7, 1987, ch. 448, § 8, 1987 Tenn. Pub. Acts 897, 899, codified at Tenn. Code Ann. § 70-7-101(2)(B).

[14] Act of May 7, 1987, ch. 448, § 5, 1987 Tenn. Pub. Acts 897, 898, codified at Tenn. Code Ann. § 70-7-104(1).

[15] The applicable recreational activities are identified in Tenn. Code Ann. §§ 70-7-102, -103.

(3) that the land on which Ms. Zegilla was killed was not exempt from coverage of the statute.[16] Thus, the only remaining question with regard to the application of the recreational use statute is whether one of Tenn. Code Ann. § 70-7-104's exceptions applies to this case. Ms. Morgan insists that the exception for gross negligence in Tenn. Code Ann. § 70-7-104(1) applies.

Gross negligence is negligent conduct reflecting a reckless disregard for the safety of others. *Davidson v. Power Bd.*, 686 S.W.2d 581, 586 (Tenn. Ct. App. 1984); *Odum v. Haynes*, 494 S.W.2d 795, 807 (Tenn. Ct. App. 1972). It does not require a particular state of mind as long as it creates an extremely unjustified risk to others. 1 DAN B. DOBBS, THE LAW OF TORTS § 147, at 351 (2001). It differs from ordinary negligence only in degree, not in kind. W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 34, at 212 (5th ed. 1984). Thus, gross negligence is a negligent act or failure to act that reflects more than lack of ordinary care (simple negligence) but less than intentional misconduct. *Inter-City Trucking Co. v. Daniels*, 181 Tenn. 126, 129-30, 178 S.W.2d 756, 757 (1944); *Bennett v. Woodard*, 60 Tenn. App. 20, 31-32, 444 S.W.2d 89, 94 (1969).

Determining whether particular conduct rises to the level of gross negligence is ordinarily a question of fact. 3 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 10:05, at 368 (1986) ("SPEISER"); *see also Adams v. Roark*, 686 S.W.2d 73, 76 (Tenn. 1985) (gross negligence determined from the facts alleged in the complaint). However, it may be decided as a matter of law when the material facts are not in dispute and when these facts, and the conclusions reasonably drawn from them, would permit a reasonable person to reach only one conclusion. *Leatherwood v. Wadley*, ___ S.W.3d ___, ___, 2003 WL 327517, at *8-9 (Tenn. Ct. App. 2003) (affirming summary judgment dismissing gross negligence claim); *Buckner v. Varner*, 793 S.W.2d 939, 941 (Tenn. Ct. App. 1990) (affirming summary judgment dismissing gross negligence claim); *Fellows v. Sexton*, 46 Tenn. App. 274, 282, 327 S.W.2d 391, 394 (1959) (granting a judgment notwithstanding the verdict on a gross negligence claim).

We find no evidence in this record upon which a reasonable person would conclude that the State was grossly negligent with regard to the construction or maintenance of the Colditz Cove State Natural Area. The State had a statutory obligation to maintain this area in a pristine, natural condition. Erecting warning signs, installing lighting along the trails, fencing the entire area, or installing guard rails, barriers, or other sorts of buffers, while perhaps appropriate at Dollywood, would have been entirely unwarranted and unnecessary at a natural area such as Colditz Cove. Accordingly, we have determined that the record, as a matter of law, supports the claims

[16] Ms. Morgan argued before the claims commissioner that improvements in state natural areas and parks were somehow exempt from Tenn. Code Ann. §§ 70-7-101, -105. However, both the Tennessee Supreme Court and this court have recognized that the recreational use statute may apply to state parks and wildlife management areas. *Parent v. State*, 991 S.W.2d at 241; *Rewcastle v. State*, No. E2002-00506-COA-R3-CV, 2002 WL 31926848, at *1 (Tenn. Ct. App. Dec. 31, 2002) (No Tenn. R. App. P. 11 application filed).

commissioner's conclusion that "there was not any gross negligence."[17] The State was simply not acting recklessly with disregard of the safety of persons entering the natural area.

Because the State was not grossly negligent, it was entitled to assert a defense predicated on Tenn. Code Ann. § 70-7-102. Therefore, we have concluded, based on the undisputed facts, that the recreational use statute shields the State from liability for Ms. Zegilla's death and that the State was entitled to a summary judgment dismissing her claims on this ground alone.

IV.
THE STATE'S LIABILITY UNDER TENN. CODE ANN. § 9-8-307(a)(1)(C)

Despite our conclusion that the State has established an affirmative defense under Tenn. Code Ann. § 70-7-102 as a matter of law, we will also address Ms. Morgan's assertion that the claims commissioner erred by concluding that she had failed to demonstrate that she would be able to prove that the State was liable for her daughter's death under Tenn. Code Ann. § 9-8-307(a)(1)(C). We have concluded that the undisputed facts also support the commissioner's conclusion that the State was entitled to a judgment as a matter of law because Ms. Morgan had not demonstrated that she would be able to prove the essential elements of her claim.

The State is not the insurer of the safety of persons on its property. *Byrd v. State*, 905 S.W.2d 195, 197 (Tenn. Ct. App. 1995). It is, however, liable to these persons to the same extent that private owners and occupiers of land are liable, *Sanders v. State*, 783 S.W.2d 948, 951 (Tenn. Ct. App. 1989), because Tenn. Code Ann. § 9-8-307(a)(1)(C) has imposed this common-law duty on the State. *Parent v. State*, 991 S.W.2d at 242. Tenn. Code Ann. § 9-8-307(a)(1)(C) provides that the State may be held monetarily liable for

> Negligently created or maintained dangerous conditions on state controlled real property. The claimant under this subsection must establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures.

Based on this statute, the State, like a private landowner, has a duty to exercise reasonable care under the circumstances to prevent foreseeable injuries to persons on the premises. *Eaton v. McLain*, 891 S.W.2d at 593-94. This duty is grounded on the foreseeability of the risk involved. To recover, a claimant must prove that the injury was a reasonably foreseeable probability. *Dobson v. State*, 23 S.W.3d 324, 331 (Tenn. Ct. App. 1999).

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[17] Ms. Morgan asserts in her brief that "the State of Tennessee knew that at Northrop [sic] Falls . . . there was a cliff that eroded into a commonly used path which suddenly dropped at a ninety degree angle approximately one hundred feet and that it posed a deadly, dangerous condition." This is the only assertion in her papers that approaches an allegation of gross negligence. We have searched the record for substantiation of this claim and have found none. There is no evidence that any of the trails in Colditz Cove had dangerously eroded on July 26, 1997. There is no evidence that the State had actual or constructive notice of any dangerous erosion along any of the trails in the natural area. There is likewise no evidence that either Ms. Zegilla or Mr. King fell to their deaths at a spot on the trail that had eroded.

Tenn. Code Ann. § 9-8-307(a)(1)(C) required Ms. Morgan to prove that Ms. Zegilla was injured in a manner that was reasonably foreseeable and that the State had actual or constructive notice of the dangerous condition that caused Ms. Zegilla's death in time to take "appropriate measures." The claims commissioner properly concluded that she failed on both counts.

The record contains no factual, legal, or policy basis for concluding that the State should have foreseen that intoxicated persons who were unfamiliar with the Colditz Cove State Natural Area would hike down the trail to Northrup Falls in the middle of the night without adequate illumination. Likewise, the record contains no evidence meeting the standards in Tenn. R. Civ. P. 56.04 and Tenn. R. Civ. P. 56.06 that the improvements to Colditz Cove are either inherently dangerous[18] or, as we have already pointed out, that the State had actual or constructive notice of any particular dangerous condition in the natural area that caused Ms. Zegilla's death.

V.
COMPARISON OF MS. ZEGILLA'S FAULT WITH THE STATE'S FAULT

As a final issue, Ms. Morgan asserts that the claims commissioner erred by determining that Ms. Zegilla's fault exceeded the State's fault. She bases her argument on the assertion that the State's "gross negligence" should somehow count for more in a comparative fault analysis. We have determined that this argument has no merit for two reasons. First, we have already concluded that the undisputed facts demonstrate, as a matter of law, that the State was not grossly negligent. Second, even if the States could somehow be considered grossly negligent, its fault would still be compared with Ms. Zegilla's fault. *Conroy v. City of Dickson*, 49 S.W.3d 868, 873 (Tenn. Ct. App. 2001). A majority of the courts in comparative fault jurisdictions permit gross negligence to be compared to ordinary negligence. 3 SPEISER, § 13:25, at 764; 1 ARTHUR BEST, COMPARATIVE NEGLIGENCE LAW & PRACTICE § 4.40[3] (1999); Restatement (Third) of Torts: Apportionment of Fault § 7 cmt. b (1999).

The allocation of fault is ordinarily a question of fact for the jury or the trial court sitting without a jury. *Brown v. Wal-Mart Discount Cities*, 12 S.W.3d 785, 789 (Tenn. 2000). The task of allocating fault should be taken from the fact-finder only when it can be determined beyond question (or alternatively, when reasonable minds cannot differ) that the plaintiff's fault is equal to or greater than the defendant's. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 91-92 (Tenn. 2000); *Eaton v. McLain*, 891 S.W.2d at 589; *Kim v. Boucher*, 55 S.W.3d 551, 556-57 (Tenn. Ct. App. 2001). The procedural avenues for obtaining a decision that the plaintiff's fault exceeds the defendant's as a matter of law are governed by the Tennessee Rules of Civil Procedure. The question may be raised using (1) a motion for summary judgment under Tenn. R. Civ. P. 56, (2) a motion for directed verdict governed by Tenn. R. Civ. P. 50.01, and (3) a post-trial motion for a judgment as a matter

[18] Ms. Morgan's lawyer asserted in the proceeding below that he had consulted an architect who "felt" that the Colditz Cove State Natural Area was "unduly dangerous" and that "the majority of the defects were certainly foreseeable and could have been rectified at a relatively modest capital investment." While the record contains an unauthenticated letter from this architect summarizing his impressions of the improvements in the natural area, it does not contain the architect's affidavit or deposition stating these conclusions. The architect's letter does not meet the requirements in Tenn. R. Civ. P. 56.04 and Tenn. R. Civ. P. 56.06 for evidentiary materials that may be used to support or oppose a motion for summary judgment.

of law governed by Tenn. R. Civ. P. 50.02. *Henley v. Amacher*, No. M1999-02799-COA-R3-CV, 2002 WL 100402, at *6 (Tenn. Ct. App. Jan. 28, 2002) (No Tenn. R. App. P. 11 application filed).

Ms. Zegilla's voluntary intoxication on the evening of July 26, 1997 does not relieve her from the responsibility of her own negligence. *Kirksey v. Overton Pub, Inc.*, 739 S.W.2d 230, 235 (Tenn. 1987); *Schwartz v. Johnson*, 152 Tenn. 586, 592, 280 S.W. 32, 33 (1926). She was required to use reasonable care under the circumstances, and her conduct must be measured against the conduct of an ordinary, reasonable person rather than an ordinary and reasonable intoxicated person. *Louisville & Nashville R.R. v. Hall*, 5 Tenn. Civ. App. 491, 502 (1915). Accordingly, if her conduct while intoxicated was a proximate cause of her death, it may be compared with the fault of the other parties whose fault was also a proximate cause. *Worley v. State*, No. 02A01-9312-BC-00267, 1995 WL 702792, at *6 (Tenn. Ct. App. Nov. 28, 1995) (No Tenn. R. App. P. 11 application filed).

It cannot be reasonably disputed that Ms. Zegilla was intoxicated when she arrived at Colditz Cove State Natural Area after midnight on July 26, 1997. Even though she had never visited the natural area before, she decided to venture into a wooded area down an unfamiliar, rough foot path in the dark. After one of her companions fell to his death, she continued to walk around in the darkness even though she must have known that danger was close at hand. As tragic as her death is, the only conclusion that reasonable persons can draw from these facts is that her fault far exceeded any fault that may reasonably be attributed to the State. Accordingly, the claims commissioner properly concluded the State was not liable to Ms. Zegilla's estate because her fault exceeded any fault that could be attributed to the State.

VI.

We affirm the order dismissing the Tenn. Code Ann. § 9-8-307(a)(1)(C) claim of Ms. Zegilla's estate against the State and remand the case to the Tennessee Claims Commission for whatever further proceedings may be required. We tax the costs of this appeal to Evelean Morgan for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.